91-407

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JOHN SCHOONOVER,

Petitioner,

v.

KLAMATH COUNTY, OREGON,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did Klamath County, Oregon's land use regulation which prevented petitioner from using his platted and developed subdivision for six (6) years, constitute a taking of his property?

2. Was the Klamath County, Oregon land use regulation dealing with rural fire protection for a "public purpose" so as to bring it within the Just Compensation Clause of the Fifth Amendment?

3. Is the imposition of a land use regulation for which compliance by petitioner was impracticable or impossible, nevertheless not a taking of petitioner's property because the property's zoning allowed other uses than that for which the property was developed?

LIST OF ALL PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption in this court.

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No. _____

In The

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October Term, 1991

JOHN SCHOONOVER,

Petitioner,

v.

KLAMATH COUNTY, OREGON,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays for the writ of certiorari to review the Order of the Court of Appeals of the State of Oregon entered February 13, 1991.

OFFICIAL REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon is reported in *Schoonover v. Klamath County, Oregon,* 105 Or. App. 611, 806 P.2d 156 (1991), rev. den. 311 Or. 432, 812 P.2d 828 (1991).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Order Denying Review of the Oregon Court of Appeals' opinion was entered on June 20, 1991.

Jurisdiction to review this order by writ of certiorari exists pursuant to **28 USC §2101(c).**

CONSTITUTIONAL PROVISION WHICH THIS CASE INVOLVES

The Just Compensation Clause of **Amendment V** of the Constitution of the United States states, "[N]or shall private property be taken for public use, without just compensation."

CONCISE STATEMENT OF THE CASE

The Klamath County, Oregon governing body, the Board of Commissioners (Commissioners) decided prior to 1981 that it wanted to change the method of providing fire protection in rural areas of the county. The change, adopted at that time, attempted to transfer responsibility for fire protection away from the County by requiring all *new* rural subdivisions to be annexed into fire districts. Klamath County, then, would not tax for, nor provide, fire protection to the new rural subdivisions. There was no general fire emergency declared and existing subdivisions were not affected; the new regulation was simply a policy change concerning taxes and the delivery of services.

In 1979 petitioner submitted his proposed subdivision to the appropriate authority in Klamath County, Oregon. He submitted a preliminary plat which received preliminary approval by the County. Petitioner then began the process of complying with conditions set forth by the County in order to receive final approval. In his rural recreation subdivision, he prepared the lots, built roads, conducted hydrology tests, and otherwise cleared the area to make the lots ready for sale and to receive final approval.

His subdivision fully developed, petitioner submitted his documentation to receive final approval in 1981. At that time the Commissioners added a condition to final approval of petitioner's subdivision, by requiring that the subdivision "be annexed into a Fire District for fire protection".[1] Petitioner attempted to comply with the requirement, but compliance proved to be impossible. He requested annexation into neighboring fire districts, but for various reasons those districts, through no fault of petitioner, declined his requests. For several years, petitioner pursued unsuccessful attempts either to comply with the condition or to have it removed.[2] In 1987, the

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[1] Petitioner's subdivision was, at all times relevant, in a fire protection district, which had as its main purpose the fighting of range fires. A fire district primarily fought structural fires.

[2] At one point petitioner requested that the Commissioners use their statutory authority to require one of the neighboring fire districts to annex his subdivision, but the Commissioners refused.

Commissioners amended the relevant ordinance, and at petitioner's request removed the contested condition at that time.[3]

Petitioner then filed this case for inverse condemnation, claiming that the condition effected a temporary taking of his property from 1981 to 1987. The jury awarded petitioner substantial damages and the trial court denied the County's motion for judgment notwithstanding the verdict.

The Court of Appeals of the State of Oregon reversed, holding that no taking of property had occurred under either the Oregon or the United States Constitution. The Supreme Court of the State of Oregon denied review.

Petitioner filed this claim alleging depreviation of his rights under the Just Compensation Clause of the Fifth Amendment of the Constitution of the United States. Petitioner asserted this claim in the trial court, the Court of Appeals and in the Oregon Supreme Court.

ARGUMENT

An Irrational Regulation

For six years petitioner could not use his subdivision. Then, with no change by petitioner, he received approval

[3] The amended ordinance allowed fire protection by having the subdivision in a fire protection district, a standard which petitioner's subdivision had met all along. See footnote 1.

when the Commissioners removed the regulation. The regulation was irrational and a mistake and petitioner lost a significant amount of money because of it.

The trial judge said of the regulation, "[T]he Court is unable to say as a matter of law that that condition as it was worded was completely reasonable."

The Oregon Court of Appeals dubbed it "impracticable or impossible." ***Id.*** 616.

Petitioner John Schoonover and his subdivision were guinea pigs. Klamath County could have hired a consultant and paid his/her fees to tell them that the scheme was faulty. Instead, the Commissioners chose trial and error at Mr. Schoonover's expense. This expense is one of those "which, in all fairness and justice, should be borne by the public as a whole." ***First English Evangelical Lutheran Church v. County of Los Angeles,*** 482 U.S. 304, 318-319, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987).

In its Response to Petition for Review in the Supreme Court of the State of Oregon, the County explained its position this way.

> The Petitioner on Review [Mr. Schoonover] argues throughout his brief that the policy of the County to require inclusion in a rural fire protection district failed. That, simply, is not correct. If anything the original policy was extremely effective and accomplished what it set out to accomplish. The policy's plain purpose was to protect property and lives from the danger of fire. During the time it was in effect, no homes were burnt and no people living there were injured, since there were no homes. For the policy to have failed, there would have had to

> have been structures constructed and then damaged by fire while unprotected. The only proper construction to put on the latter commission's actions in easing the regulation was that the original policy was felt to be too effective and the lessor policy would accomplish the same goals. ***Response to Petition for Review By Klamath County, Oregon***, pp. 3-4 (1991).

Prohibiting the building of homes in an otherwise allowed subdivision constitutes exactly the type of regulatory taking recognized in ***First English Evangelical Lutheran Church v. County of Los Angeles, Id.*** Surely, rational analysis would not allow, absent compelling circumstances, a governmental entity to prohibit buildings because one of them might catch fire. Further, a "too effective" policy is one which by definition goes "too far" when a less stringent policy would have accomplished the government's purpose.

The Oregon Court of Appeals found that the challenged policy of Klamath County's met the rational nexus test of ***Nollan v. California Costal Commission***, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). The Oregon Court of Appeals found that "[t]he fact that the policy turned out to be impracticable or impossible with respect to plaintiff's property does not mean that the government effected a taking of the property while the regulation was in effect." ***Schoonover v. Klamath County, supra,*** 616. Petitioner urges that to meet the rational nexus test of ***Nollan*** means that the policy itself must be rational. An impossible condition placed upon someone's land which prevents the use of that land is, in itself, irrational and unreasonable. A court cannot look merely at the printed words of the condition to determine its reasonableness; it

must look to the ability of the landowner to meet and apply that condition.

Petitioner suggests that regulations which shut down land use presumptively are unreasonable and are takings under the Fifth Amendment, absent compelling circumstances. Just as it would not be reasonable to protect people from crime by prohibiting anyone from living in a high crime residential area, likewise it is a taking of property to prohibit building in an otherwise approved subdivision just because someone's house might catch fire. The "too effective" policy of Klamath County's was a taking of petitioner's property.

In reality, the challenged regulation was an experiment. The Commissioners were groping for a workable plan for rural fire protection and for adjustment of taxation. The regulation which tied up petitioner's property for six (6) years was a failure and, so, it was abandoned.

Significant Interference With Use Of Land

A clearly defined term setting forth the amount of interference with an owner's use of his land has not been developed by this Court. In ***First English Evangelical Lutheran v. Los Angeles County, supra,*** 260, the Court referred to the allegation of the "taking of all use." However, it is clear that it is not necessary that "all use" be taken to state a Fifth Amendment claim. See, ***U.S. v. Causby,*** 328 U.S. 256, 267, 90 L.Ed. 1206, 66 S.Ct. 1062 (1946) wherein a compensable taking occurred when "low flying, frequent aircraft caused a diminution in value of the property . . . ."

This Court seems to have adopted the view that a regulation which has the effect of substantially frustrating "reasonable investment backed expectations" constitutes a per se taking. (See e.g., ***Kaiser Aetna v. United States,*** 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979); ***Keystone Bituminous Coal Assoc. v. DeBenedictis,*** 480 U.S. 470, 493, 499, 107 S.Ct. 1232, 1246, 1249, 94 L.Ed.2d 472, 494, 497 (1987); See also, ***Michelman, Takings,*** 1987, 88 Colum. L. Rev. 1600, 1604, n. 22 (1622).

> [T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action must be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with a reasonable investment backed expectations, and the character of the government action – that have particular significance. (Citations Omitted). ***Keystone Bitumonius Coal Association v. DeBenedictis, supra,*** 495.

Another factor which appears to be present in the different cases is whether or not the case is a facial attack on the challenged regulation, or whether, as herein, the case deals with the challenged regulation's effect on a particular piece of property. Petitioner Schoonover has shown that the regulation in question made "it commercially impracticable for [him] to continue" his subdivision in this case. ***Id.*** 495-496.

In a theoretical, but unrealistic way, the Oregon Court of Appeals observed that "plaintiff remained able to use his property for any number of uses consistent with its zoning." ***Schoonover v. Klamath County, supra,*** 616. The Court of Appeals does not identify those other available uses. The record in the trial court contains no testimony concerning the availability of other uses of the property. The record is clear that the property could not be used for its intended and developed use and it was on that basis that the jury found a taking to have occurred. If all that is required to avoid a finding of a regulatory taking is a theoretical, permitted use in the zoning laws, no matter how practical or impractical that use may be, then there is no such thing as a regulatory taking.

This Court, certainly, has not analyzed cases dealing with regulatory takings in this way. Apparently, if it were possible (and the record does not contain any evidence on this issue) that Mr. Schoonover could grow farm vegetables on some of the parcels in the subdivision, then the Oregon Court of Appeals would find that that is sufficient to prevent a regulatory taking of his property. Petitioner asserts that that analysis is faulty; the ability of a parcel to sustain the growing of tomatoes should not allow the government to arbitrarily prevent the landowner from using his property for its intended use.

Contrast the thinking of the Oregon Court of Appeals with the analysis done by the California Court of Appeals, Second District, Division 7 in ***First English Evangelical v. County of Los Angeles,*** 258 Cal. Rptr. 893 (Cal. App. 2 Dist. 1989), cert. den. ___ U.S. ___, 110 S.Ct. 866, 107 L.Ed.2d 950 (1990) on the remand of this Court's decision in ***First English Evangelical Lutheran Church v.***

County of Los Angeles, supra. That Court found that the First Evangelical Lutheran Church could use its campground Lutherglen for campground purposes; it just could not rebuild certain buildings. The Court pointed out that many camping activities could continue. Meals could be cooked, games played, lessons given, and tents pitched. ***First English Evangelical v. County of Los Angeles, supra,*** 902. The Court noted that such activities would have meant little to the landowner if Lutherglen had been a factory or coal mine, but that "uses of value to that purpose [camping] remained available during the time the interim ordinance was in effect." ***Id.***

The same court in ***First English v. County of Los Angeles*** points out that Lutherglen received the "reciprocity of advantage" referred to in ***Agins v. Tiburon,*** 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Lutherglen received the safety benefits of not having structures built on other properties which might endanger Lutherglen. ***First English v. County of Los Angeles, supra,*** 905.

In petitioner's case there was no such "reciprocity of advantage." Klamath County wanted to effectuate a change in its fire protection and taxation policies. It used Mr. Schoonover's subdivision in an experimental way to try to effectuate this policy. The County finally determined that the experiment was a failure because it could not (or would not) force all subdivisions into fire districts. Mr. Schoonover was able to get the condition dropped, but not until he had been deprived of the use of his property for six years and, during that six years, he had received no advantage to himself, while Klamath County had learned it must accomplish its purpose in another way.

Public Purpose

The Oregon Court of Appeals' analysis that the interference with (taking) of petitioner's property was not for a public purpose because the regulation was not "a step in a plan to acquire the property for public use," ***Schoonover v. Klamath County, supra,*** 615, is patently wrong. A regulatory taking case deals with a regulation which goes "too far," not a plan to acquire public ownership. The Court of Appeals' characterization of the regulation as being "a proper exercise of the police power" is inconsistent with the finding of no "public purpose." Petitioner sees the regulation as an exercise of the police power, and, hence, for a public purpose, but not a proper exercise of the police power.

REASONS FOR ALLOWANCE OF THE WRIT

The case law on regulatory takings has been developing in this Court for many years. Procedurally, this Court has developed the rule that a claim for regulatory taking must first be asserted in the state courts through the process of an inverse condemnation proceeding. With ***First English Evangelical Lutheran Church v. Los Angeles County, supra,*** this Court was finally able to consider the merits of whether such a claim could be brought for damages. However, that case was one asserting a facial challenge and was not one that had been developed with a record at trial.

The instant case was tried to a jury, the jury found in favor of the plaintiff ruling that a taking had occurred and assessed damages. This developed record allows the

Court an excellent vehicle to answer the questions previously unanswered by this Court's opinions. These questions have a nationwide importance in similar state court litigation.

This Court needs to provide instruction to state courts dealing with inverse condemnation cases asserting a regulatory taking. For instance, it has been pointed out in an Oregon publication that "the Oregon Supreme Court has never found a local land use regulation to constitute a taking . . . ." 2 Land Use (Oregon CLE 1982/1988) §23.32. It seems that the state courts are not receptive to regulatory takings claims. Given that this Court has instructed practitioners and judges that a regulatory taking proceeding must first be brought as an inverse condemnation claim in state court, this Court should address the issues presented in this case concerning what constitutes public use and how much of an interference with property rights constitutes a taking for Fifth Amendment purposes.

CONCLUSION

The questions presented and the developed record in this case provide an excellent vehicle for instructing state courts concerning takings claims brought as inverse condemnation proceedings.

Respectfully submitted,

G. PHILIP ARNOLD
Drescher & Arnold
Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF OREGON

SCHOONOVER JOHN Respondent/Petitioner	)	ORDER DENYING
v.	)	REVIEW CA A61567
KLAMATH COUNTY Appellant/Respondent	)	SC S37969

The Court has considered the petition for review and ORDERS that it be denied.

DATE: June 20, 1991.

/s/ EDWIN J. PETERSON
EDWIN J. PETERSON
CHIEF JUSTICE

COPIES TO:

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Attorney for Respondent/Petitioner

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FILED: February 13, 1991

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

JOHN SCHOONOVER,

Respondent,

v.

KLAMATH COUNTY, OREGON,

Appellant.

(88-165-CV; CA A 61567)

Appeal from Circuit Court, Klamath County.

Donald A. W. Piper, Judge.

Argued and submitted July 30, 1990.

Michael L. Spencer, Klamath Falls, argued the cause and filed the brief for appellant.

G. Philip Arnold, Ashland, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Rossman and De Muniz, Judges.

DE MUNIZ, J.

Reversed and remanded with instructions to enter judgment for defendant.

APPELLATE JUDGMENT

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

[ ] No costs allowed.
[xx] Costs allowed, payable by: Respondent

MONEY JUDGMENT

Judgment #1

Creditor: KLAMATH COUNTY, OREGON

Debtor: JOHN SCHOONOVER

Costs:	$1,541.50*
Attorney fees:	-0-
TOTAL AMOUNT:	$1,541.50

Interest: Simple, 9% per annum, from the date of this appellate judgment.

*$100 of this amount to be paid directly to:
STATE COURT
ADMINISTRATOR

This section to be completed when the appellate judgment issues. See ORAP 14.05(3).

Appellate Judgment
Effective Date: July 29, 1991

COURT OF APPEALS
(seal)

FILED: February 13, 1991

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

JOHN SCHOONOVER,

Respondent,

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Appellant.

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G. Philip Arnold, Ashland, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Rossman and De Muniz, Judges.

DE MUNIZ, J.

Reversed and remanded with instructions to enter judgment for defendant.

DE MUNIZ, J.

Defendant appeals a money judgment for inverse condemnation in favor of plaintiff, entered after a jury trial. We conclude that the trial court erred when it denied defendant's motion for judgment *n.o.v.* and reverse.

Plaintiff claims that an ordinance, as applied in the form of a condition to development of a proposed subdivision, effected a "temporary regulatory taking" of his property under Article I, section 18, of the Oregon Constitution and the Fifth Amendment to the United States Constitution. We conclude that there was no taking under either provision.

In 1981, the Klamath County Commissioners, as a condition to final approval of plaintiff's application for a proposed subdivision, and in full accordance with ordinances then in effect, required that the tract of land "be annexed into a Fire District for fire protection." Plaintiff attempted to comply with the requirement, but compliance ultimately proved to be a difficult, if not impossible, task. He requested annexation into fire districts but, for various reasons that need not be detailed here, those districts, through no fault of plaintiff, declined his requests. For several years, plaintiff pursued unsuccessful attempts either to comply with the condition or to have it removed. In 1987, the commissioners decided to abandon a successor ordinance that *required*[1] annexation into a fire district. At plaintiff's request, the contested condition was removed at that time.

Plaintiff then filed this action for inverse condemnation, claiming that the condition effected a temporary

taking of his property from 1981 to 1987. At the end of plaintiff's case, defendant moved for a directed verdict on the ground that plaintiff had failed to establish that a taking had occurred. The trial court denied the motion. A jury awarded plaintiff substantial damages. Defendant moved for judgment *n.o.v.* on the same ground that had been raised in its motion for directed verdict. *Wampler v. Sherwood*, 281 Or 261, 270, 574 P2d 319 (1978). The trial court denied the motion.

A motion for judgment *n.o.v.* should be granted when there is no evidence to support the verdict. *Haslebacher v. Bliven*, 55 Or App 929, 931, 640 P2d 668, *rev den* 293 Or 146 (1982). The issue is whether plaintiff presented any evidence that the condition resulted in a taking of his property within the meaning of either or both of the constitutional provisions cited above. We have reviewed the evidence in the light most favorable to plaintiff, *Package Containers v. Director's*, 270 Or 845, 846, 530 P2d 40 (1974), and conclude that he did not.

Article I, section 18, of the Oregon Constitution provides, in part:

> "Private property shall not be taken for public use * * * without just compensation; nor except in the case of the state, without such compensation first assessed and tendered."

The Fifth Amendment[2] to the United States Constitution provides, in part:

> "[N]or shall private property be taken for public use, without just compensation."

The Oregon Supreme Court has observed that the "basic thrust" of the two constitutional provisions "is

generally the same" but has cautioned that the "criteria" used to determine if a "taking for public use" has occurred within the meaning of the Oregon Constitution "are not necessarily identical to those pronounced from time to time by the United States Supreme Court under the fifth amendment." *Suess Builders v. City of Beaverton,* 294 Or 254, 259 n 5, 656 P2d 306 (1982).[3]

Oregon courts have recognized that a regulation may effect a taking under Oregon's constitution of it

> "is a step in a plan to acquire the property for public use and denies the owner an economic use of the property pending its eventual acquisition. *See Suess Builders, supra,* 294 Or at 257-61; *Fifth Avenue Corp. v. Washington Co.,* 282 Or 591, 581 P2d 50 (1978)." *Dunn v. City of Redmond,* 303 Or 201, 205, 735 P2d 609 (1987).

Nothing in the record suggests, even remotely, that Klamath County imposed the contested condition as a step in a plan to acquire the property for public use. It merely regulated the private use of land by requiring annexation into a fire district as a condition to the development of the property as a subdivision.

In *Clarke v. Port of Portland,* 23 Or App 730, 543 P2d 1099 (1975), the complaint alleged that the government had refused to rezone and that the plaintiffs had been prevented from developing their real property to its highest and best use or selling it on the open market for that use. In affirming the court's dismissal of the complaint for failure to state a claim, we interpreted those allegations to mean that the government's refusal to rezone precluded the plaintiffs from the "most monetarily profitable use" of their property. We said:

> "If depriving a property owner of the greatest profit he might get from using or selling his property constitutes inverse condemnation, all zoning and land use planning laws would be jeopardized." 23 Or App at 731.

Plaintiff's case boils down to a claim that his inability to comply with the condition and the county's refusal to remove it for a period of six years precluded him from using the property for what he believed to be its highest and best use, the development of a subdivision. As we observed recently:

> "Inconvenience, reduction in profits or depreciation in the value of property that occurs as a result of a legitimate exercise of the state's police power is *damnum absque injuria* and not a compensable taking." *Gruner v. Lane County*, 96 Or App 694, 697, 773 P2d 815 (1989).

The application of the ordinance in the form of a condition to the development of plaintiff's subdivision was clearly a proper exercise of the police power. It did not preclude plaintiff from use and enjoyment of the property in any number of other uses consistent with its zoning. He is seeking consequential damages for his loss of income due to his inability to comply with the condition. There was no taking under the Oregon Constitution on these facts.

We reach the same conclusion under the federal constitution.[4] We begin by observing that the nexus between the government's goal, fire protection for residents of subdivisions, and the means of achieving that goal, placing a condition on the development of subdivisions by

requiring their annexation into fire districts, is self evident. *Nollan v. California Coastal Commission*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987). The fact that the policy turned out to be impracticable or impossible with respect to plaintiff's property does not mean that the government effected a taking of the property while the regulation was in effect. As we observed in the discussion under the state constitution, plaintiff remained able to use his property for any number of uses consistent with its zoning. He simply was denied the opportunity to develop it as a subdivision. That is not a "taking of property for public use" within the meaning of the Fifth Amendment.[5]

The court erred by failing to allow defendant's motion for judgment *n.o.v.* We reverse and, pursuant to our authority under Art VII (amended), section 3, remand with instructions to enter judgment for defendant.

Reversed and remanded with instructions to enter judgment for defendant.

FOOTNOTES

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[1] The ordinance in effect when plaintiff applied for subdivision approval provided that the county "may" require annexation as a condition to subdivision development. The successor ordinance made annexation mandatory.

[2] The Just Compensation Clause of the Fifth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 US 155, 160, 101 S Ct 446, 66 L Ed 2d 358 (1980).

[3] In *Cereghino v. State Highway Com.*, 230 Or 439, 445, 370 P2d 694 (1962), the court said that the two provisions "are identical in language and meaning."

[4] If a regulation is found to effect a temporary taking of property for public use, the Fifth Amendment requires the government to pay just compensation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 US 304, 107 S Ct 2378, 96 L Ed 2d 250 (1987).

[5] Given our disposition of the appeal, we need not address defendant's remaining assignments of error.